85-485

Supreme Court, U.S.
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No. 85-

In the

Supreme Court of the United States

OCTOBER TERM, 1985

IN RE JOHN W. GIBSON,
APPELLANT

ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether suspension of an attorney from practice and imposition of costs in excess of $9,000 solely on the basis of a finding that the attorney violated a standard of conduct with which he had not been charged violates the Due Process Clause of the Fourteenth Amendment.

2. Whether a standard for attorney conduct defined by reference to a disciplinary proceeding which focused on an attorney's series of hostile and aggressive public outbursts is so vague as to violate the Due Process Clause of the Fourteenth Amendment when used as the sole basis for suspending an attorney from practice and imposing costs in excess of $9,000 on a finding that on one occasion the attorney made unsolicited sexual advances to a client.

PARTIES TO PROCEEDING

The parties to the proceeding in the Supreme Court of Wisconsin were John W. Gibson, appellant herein, and the Board of Attorneys Professional Responsibility, appellee herein.

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OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is set forth in Appendix A and is reported at 124 Wis. 2d 466 and 369 N.W.2d 695. The Referee's Report and Recommendation is set forth in Appendix B.

JURISDICTION OF THIS COURT

This is an appeal from a final order of the Wisconsin Supreme Court suspending a lawyer from practice and imposing costs in excess of $9,000 for violation of a purported standard of professional conduct referred to *State v. Heilprin*, 59 Wis. 2d 312, 207 N.W.2d 878 (1973). Appellant contends that the procedure by which he was disciplined and the standard of conduct under which he was disciplined are invalid under the Due Process Clause of the Fourteenth Amendment.

The order of the Wisconsin Supreme Court suspending appellant was entered on June 24, 1985 (App. A, A-1). The order of the Wisconsin Supreme Court denying appellant's motions for reconsideration and a stay was entered on July 5, 1985 (App.

C, C-1). A notice of appeal was filed in the Supreme Court of Wisconsin on July 17, 1985 (App. D, D-1). An application for a stay was presented to Justice John Paul Stevens on or about July 18, 1985 and denied on July 23, 1985. On August 14, 1985, the Wisconsin Supreme Court entered a judgment for costs against the appellant in the sum of $9,193.35 (App. C, C-2). An amended notice of appeal was filed in the Supreme Court of Wisconsin on August 20, 1985 (App. D, D-2). Jurisdiction in this court is based upon 28 U.S.C. §1257(2). The questions were raised in the Wisconsin Supreme Court in appellant's Brief and in the Motion for Reconsideration.

If the Court determines that an appeal is not proper in this case, appellant requests that the papers be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> . . . nor shall any State deprive any person of life, liberty or property without due process of law . . .

Wis. S. Ct. R. 20.35(1)(c) [DR 7-101(A)(3)] provides:

> (1) A lawyer may not intentionally:
>
> . . .
>
> (c) Prejudice or damage the client during the course of the professional relationship . . .

Wis. S. Ct. R. 20.05(5) provides:

An attorney is subject to discipline for misconduct. Misconduct is conduct that violates

> . . .
>
> (5) A standard of professional conduct as defined by the supreme court by rule, order or decision.

STATEMENT OF THE CASE

1. The Charges.

This appeal challenges a suspension from practice and judgment of costs imposed upon the appellant by the Wisconsin Supreme Court in an attorney disciplinary proceeding. The proceeding arose out of a complaint filed in that court on April 11, 1984 by the State Board of Attorneys Professional Responsibility. In its complaint, the Board charged appellant with violating Wis. S. Ct. R. 20.35(1)(c) [DR 7-101(A) (3)], which provides that "[a] lawyer may not intentionally . . . prejudice or damage the client during the course of the professional relationship." The complaint alleged appellant violated this rule by initiating an unsolicited sexual encounter with a client the evening before the client and appellant were to appear in court for a hearing on a temporary injunction which the client had obtained against her husband in connection with domestic abuse. The complaint alleged that appellant's conduct had a deleterious effect on the client.

On April 10, 1984, appellant filed an answer to the Board's complaint denying the conduct alleged and denying that such conduct would constitute a violation of the rule charged.

2. The Referee's Report and Recommendation.

Pursuant to Wis. S. Ct. R. 22.11(4), a Referee was appointed by the Chief Justice of the Wisconsin Supreme Court. On November 14 and 15, 1984, the Referee conducted a hearing on the Board's complaint. At the hearing and in its memoranda submitted to the Referee before and after, the Board limited its case and argument to the violation charged in the complaint, namely, that appellant had violated Wis. S. Ct. R. 20.35(1)(c). Appellant defended on the ground that he had not engaged in the conduct charged and that, even if he had, such conduct did not constitute a violation of Wis. S. Ct. R. 20.35(1)(c).

On January 2, 1985, the Referee dated his Report and Recommendation (App. B, B-1). The Referee found that appellant had engaged in the conduct alleged in the Board's complaint (*id.*

at B-10). The Referee decided, however, that it was immaterial whether or not this conduct violated Wis. S. Ct. R. 20.35(1)(c) (*id.* at B-14). He concluded that the record clearly established that appellant had violated a number of ethical considerations and that, as a result, appellant should be suspended for a period of 90 days (*id.* at B-17).

On January 23, 1985, in response to the Referee's action, both the Board and appellant filed notices of appeal to the Wisconsin Supreme Court.

3. The Decision of the Wisconsin Supreme Court.

In the Wisconsin Supreme Court, appellant argued, *inter alia*, that the record below would not support a conclusion that appellant had violated Wis. S. Ct. R. 20.35(1)(c) and that to discipline appellant for the violations of ethical considerations found by the Referee would violate appellant's due process rights under the United States Constitution in that (1) the violations were not charged in the Board's complaint and (2) under Wisconsin law, violations of ethical considerations do not constitute disciplinable offenses. The Board argued that the court should conclude that appellant had violated Wis. S. Ct. R. 20.35(1)(c) as charged in the Board's complaint.

On June 24, 1985, the Wisconsin Supreme Court rendered its opinion and order (App. A, A-1). The court accepted the Referee's findings of fact that appellant had made unsolicited sexual advances to a client (*id.* at A-1). However, the court did not find that appellant had violated Wis. S. Ct. R. 20.35(1)(c), as charged in the Board's complaint, or that appellant had violated the ethical considerations cited by the Referee (*id.* at A-1). Rather, the court concluded that appellant's actions violated a standard of professional conduct enunciated by the court in *Heilprin* and ordered appellant suspended for 90 days for that reason (*id.* at A-2). At no time had the Board ever argued that appellant had violated this standard of conduct. In fact, the *Heilprin* case was not cited in the Board's brief.

4. Appellant's Motions for Reconsideration and for Stay.

On June 28, 1985, appellant filed a motion in the Wisconsin

Supreme Court requesting reconsideration of its order on the grounds that suspension of appellant for violation of the *Heilprin* standard of conduct would violate appellant's right to due process in that appellant was never charged with violation of the *Heilprin* standard and in that the *Heilprin* standard is unconstitutionally vague and overbroad. On June 28, 1985, appellant also filed a motion for stay until determination of an appeal by this Court.

These motions were summarily denied by the Wisconsin Supreme Court on July 5, 1985 (App. C, C-1). On July 18, 1985, appellant filed a motion for a stay in this Court which was denied by Justice Stevens on July 23, 1985 (No. A-58). On August 14, 1985, the Wisconsin Supreme Court entered a judgment for costs against appellant in the sum of $9,193.35 (App. C, C-2).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal raises substantial questions regarding the protections afforded under the Due Process Clause of the Fourteenth Amendment to attorneys charged with professional misconduct. In *In re Ruffalo*, 390 U.S. 544 (1968), this Court held that attorneys charged with professional misconduct are entitled to procedural due process. However, in the years since *Ruffalo*, substantial conflicts have arisen among the decisions of the highest state courts and between the decisions of certain of these courts and the federal courts of appeals regarding the extent of the process due such attorneys with regard to (1) what constitutes fair notice of the charges upon which discipline is to be predicated and (2) the requisite clarity of the standards of conduct under which discipline may be imposed. This appeal calls upon the Court to illuminate the constitutional principles governing each of these issues.

1. Notice of Charges.

In *Ruffalo*, this Court established that attorneys charged with professional misconduct are entitled to "fair notice of the charge." 390 U.S. at 550. The Court held that where there is an "absence of fair notice as to the reach of the grievance procedure

and the precise nature of the charges," the proceedings violate due process. 390 U.S. at 552. However, in decisions since *Ruffalo*, courts have interpreted "fair notice" in such a disparate manner as to establish within their respective jurisdictions fundamentally different federal constitutional notice requirements.

One set of courts has interpreted "fair notice" to require notice, prior to hearing, of the specific conduct alleged to have occurred *and* the specific rules of professional responsibility that the state will contend such conduct violates. See *In re Phelps*, 637 F.2d 171, 174 (10th Cir. 1981); *Committee on Professional Ethics and Grievances v. Johnson*, 447 F.2d 169, 173 (3rd Cir. 1971); *Elisovsky v. State*, 592 P.2d 1221, 1227 (Alas. 1979); *Walker v. Supreme Court*, 275 Ark. 158, 162-63, 628 S.W.2d 552, 554-55 (1982); *People v. Emeson*, 638 P.2d 293, 294 (Colo. 1981); *In re Aungst*, 467 N.E.2d 698, 700 (Ind. 1984); *In re McCarthy*, 466 N.E.2d 442, 443 (Ind. 1984); *In re Roberts*, 442 N.E.2d 986 (Ind. 1983).

Another set of courts has interpreted "fair notice" to require only notice, prior to hearing, of the 'basic factual situation out of which charges might result.' These courts do not require notice of the specific rules allegedly violated. See *State v. Caenen*, 235 Kan. 451, 458-59, 681 P.2d 639, 644-45 (1984); *State v. Zeigler*, 217 Kan. 748, 752-53, 538 P.2d 643, 646 (1975); *State v. Turner*, 217 Kan. 574, 579-80, 538 P.2d 966, 972 (1975); *Board of Overseers v. Rodway*, 461 A.2d 1062, 1064 (Me. 1983); *Attorney Grievance Commission v. McBurney*, 282 Md. 116, 123-24, 383 A.2d 58, 62-63 (1978); *In re Wright*, 131 Vt. 473, 487-88, 310 A.2d 1, 8-9 (1973). Certain of these courts have held that it is only if the prosecuting authority alleges violations of specific rules that the attorney has a right to insist that any discipline be imposed only for violations of the rules alleged. See *State v. Caenen*, 235 Kan. at 458-59, 681 P.2d at 644-45; *Attorney Grievance Commission v. McBurney*, 282 Md. at 123-24, 383 A.2d at 62-63.

Decisions of this Court since *Ruffalo* have not resolved this conflict. In *In re Snyder*, 105 S. Ct. 2874 (1985), the issue of lack

of fair notice was properly raised but the Court's disposition of the case rendered its resolution unnecessary. 105 S. Ct. at 2880-82. In *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985), the Court considered an attorney's claim that a public reprimand violated his rights to procedural due process. However, *Zauderer*—unlike this case, *Ruffalo* and the cases cited above—did not involve a post-hearing change in the offense with which the attorney had been charged. It involved only a post-hearing change in the legal theory of the state's case. 105 S. Ct. at 2283-84. Zauderer was disciplined for the same offense with which he had originally been charged—deceptive advertising. *Id.* at 2272-74.

In *Zauderer*, all that the Court appeared to decide was that such change in theory should be held to violate due process only upon a showing of actual prejudice. 105 S. Ct. at 2284 n.18. The Court neither decided nor indicated that such a showing was necessary to establish that a post-hearing change in charges violated the due process.

As a result, *Zauderer* does not resolve the conflict as to whether attorneys charged with professional misconduct are entitled to notice, prior to hearing, of the specific rules under which they are to be disciplined. Moreover, even if *Zauderer* is uniformly read as establishing that lack of such notice offends due process only if actual prejudice is shown, it will remain unclear what facts constitute demonstrable prejudice other than the "trap" scenario in *Ruffalo*.

This appeal calls upon the Court to resolve this question. Appellant admittedly was on notice from the beginning of the proceedings below that he allegedly made unsolicited sexual advances to a client. However, appellant was specifically informed that he was being charged, as a result of this conduct, only with intentionally prejudicing or damaging a client during the course of a professional relationship. Appellant was never informed until he received the Wisconsin Supreme Court's final order suspending him from practice, that he was charged with violation of the significantly different standard of conduct set forth in *Heilprin*.

In *Heilprin*, the Wisconsin Supreme Court ruled that Attorney Heilprin's repeated aggressive and hostile professional "outbursts" and "flare-ups"—which outbursts included exposing himself and making obscene gestures and remarks to clients —constituted disciplinable conduct. 59 Wis. 2d at 314-23, 207 N.W.2d at 879-83. This conduct is far removed from making an unsolicited sexual advance.

The change of the charge, occurring after trial and appeal, prejudiced appellant and deprived him of due process. This case was tried upon the theory that appellant intentionally prejudiced his client. Appellant denied the acts charged, and the issue was his credibility as opposed to the credibility of the complainant. Over strenuous objection, the Board introduced other acts evidence indicating that appellant propositioned three other clients at indefinite times, none of which conduct violated any disciplinary rule. Appellant introduced evidence of 15 clients, many of whom were vulnerable females, to show that he did not engage in such conduct. As rebuttal testimony, the Board introduced testimony of Bankruptcy Judge Martin that he did not regard appellant as credible. In spite of the Referee's reliance upon other acts of evidence to resolve the credibility issues against appellant, the Wisconsin Supreme Court did not rule upon the evidentiary issues, holding that Judge Martin's testimony was sufficient to resolve the credibility issue against appellant. Had the case been tried upon the charge ultimately chosen by the court, none of this evidence would have been admissible.

It is extremely difficult for an attorney to defend charges involving sexual relations with clients. In such cases, it becomes impossible to defend where the attorney is not informed the charge.

2. Vagueness

It is well established that a regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S.

385, 391 (1926). The Fourteenth Amendment's Due Process Clause "insists[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). These guarantees apply fully to attorney disciplinary proceedings. *Ruffalo*, 390 U.S. at 550. In *Ruffalo*, it was noted that where "[t]he appraisal of [an attorney's] conduct is one about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question," and where the State has not otherwise proscribed the conduct in reasonably clear terms, the Due Process Clause forbids punishment of the attorney for that conduct. 390 U.S. at 555-56 (White, J., concurring in result). See also *Zauderer*, 105 S. Ct. at 2283 & n. 15.

Despite this authority, courts in a number of jurisdictions have continued to subject or at least threaten attorneys with discipline for violation of vague and unreasonably unclear standards of conduct. See generally *Board of Overseers v. Rodway*, 461 A.2d at 1064 & n.4 (the conduct of attorneys in disciplinary proceedings will be judged "against the entire Code of Professional Responsiblity" and, by saying this, "we do not suggest that the Code itself exhausts the entire realm of professional responsibility").

This appeal calls upon the Court to establish that the concept of vagueness has proscriptive content in the area of standards of professional conduct for attorneys. Factually, appellant here was found to have, on one occasion, made an unsolicited sexual advance to a client. In Wisconsin, at least until the time of appellant's suspension, reasonable persons would have had to guess at whether the state's code of professional responsibil-

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[1]In other states, DR 1-102(A)(6) has been held to prohibit certain types of sexual contact with clients. See *In re Wood*, 358 N.E.2d 128 (Ind. 1976); *Committee on Professional Ethics and Conduct v. Durham*, 279 N.W.2d 280 (Iowa 1979). However, Wisconsin has not adopted DR 1-102(A)(6).

ity prohibited such conduct, particularly since Wisconsin, unlike other states, has no disciplinary rule regulating sexual relations between attorney and client.[1]

Reasonable persons would not have guessed that *Heilprin* prohibited such conduct. As noted above, the Wisconsin Supreme Court in *Heilprin* held that Heilprin's repeated aggressive and hostile professional "outbursts" and "flare-ups" constituted disciplinable conduct. 59 Wis. 2d at 322, 207 N.W.2d at 883. Heilprin's sexual activities were admittedly a component of that conduct. 59 Wis. 2d at 315-16, 207 N.W.2d at 879-80. However, Heilprin's sexual activities were of a sort quantitatively and qualitatively different than the single incident of "sexual advances" found here. Heilprin admitted to having indecently exposed himself to a number of clients and to having made obscene gestures and remarks to a number of clients. *Id.* Moreover, the Wisconsin Supreme Court barely discussed Heilprin's sexual activities in its opinion. The opinion is devoted almost exclusively to a discussion of Heilprin's record of more public aggressive behavior. For example, Heilprin was found to have repeatedly screamed at court personnel, calling them stupid, irresponsible and dishonest, and to have threatened opposing parties in litigation with physical harm if they did not enter into settlements 59 Wis. 2d at 314-18, 322, 207 N.W.2d 879-81, 883.

Not surprisingly, until appellant's case *Heilprin* was authority for the disciplinable nature of "hostile and aggressive behavior" by attorneys, not their sexual conduct. See, *e.g.*, *State V. Ledvina*, 71 Wis. 2d 195, 204, 237 N.W.2d 683 (1976). To impose discipline upon appellant because he engaged in "conduct of the type engaged in by Heilprin" (App. A, A-2) violates due process.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction.

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APPENDIX A

APPENDIX A

State of Wisconsin in Supreme Court

In the Matter of the Disciplinary Proceedings Against:

John W. Gibson,
Attorney at Law.

Case No. 84-731-D
Filed June 24, 1985

PER CURIAM

Attorney disciplinary proceedings; attorney's license suspended.

Attorney John W. Gibson appealed from the referee's findings and conclusions that he had engaged in unprofessional conduct by making sexual advances to a woman client and from the referee's recommendation that a 90-day suspension of his license to practice law in Wisconsin is appropriate discipline. The Board of Attorneys Professional Responsibility cross-appealed from the referee's recommendation for discipline, contending that the unprofessional conduct warrants the revocation of Attorney Gibson's license.

The referee's findings of fact are not clearly erroneous, and we accept them. However, we do not accept the referee's conclusions that Attorney Gibson violated SCR 20.35(1)(c)[1], as charged in the Board's complaint, and that he engaged in professional misconduct by violating enumerated "Ethical Considerations"

[1]SCR 20.35(1)(c) provides:

(1) A lawyer may not intentionally:

. . .

(c) Prejudice or damage the client during the course of the professional relationship, except as required under SCR 20.36(2)."

set forth in the Code of Professional Responsibility, SCR chapter 20.[2] Rather, we conclude that Attorney Gibson's actions violated a standard of professional conduct enunciated by this court in *State v. Heilprin*, 59 Wis.2d 312, 207 N.W.2d 878 (1973), thereby warranting the imposition of discipline. We determine that a 90-day suspension of Attorney Gibson's license to practice law is appropriate under the circumstances of this case.

Attorney Gibson was admitted to practice law in Wisconsin in 1961 and has practiced in Madison since 1971. He has not previously been the subject of formal disciplinary proceedings. In June, 1981, Roger and Diane Slane consulted Attorney Gibson concerning several legal problems. In addition to financial problems, for which Attorney Gibson represented them in a Chapter 13 proceeding, the couple was experiencing serious marital problems. They met with Attorney Gibson some 20 times over the course of his representation, and Mrs. Slane met with him alone some five times.

Mr. and Mrs. Slane testified at the disciplinary hearing that at almost every meeting they had with him, Attorney Gibson brought up sexually related matters in the course of their discussions. On one occasion he related an incident in which a former client, who appeared to be experiencing mental problems,

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[2]The referee concluded that Attorney Gibson's conduct violated the following Code provisions:

SCR 20.02(5): "A lawyer should maintain high standards of professional conduct . . . and should refrain from all illegal and morally reprehensible conduct";

SCR 20.23: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties . . . his or her personal interest . . . should not be permitted to dilute a lawyer's loyalty to a client"; and

SCR 20.48: "A lawyer should avoid even the appearance of professional impropriety . . . A lawyer should promote public confidence in our system and in the legal profession."

had asked him to visit her at home and, when he arrived, was dressed in a negligee and suggested they have a sexual relationship. On other occasions, Attorney Gibson complimented Mrs. Slane's appearance in the presence of her husband and told her that she was beautiful, and at one meeting when her husband was absent, he complimented her on her physical attributes.

The alleged misconduct in this disciplinary proceeding occurred during the evening of July 13, 1982. On July 9, 1982, following a violent episode with her husband, Mrs. Slane made application to Dane county circuit court for a temporary restraining order to remove her husband from the couple's home, where they lived with their five children, and a hearing on the motion was scheduled for July 14. On the day before the hearing, Mrs. Slane telephoned Attorney Gibson to make an appointment, and he told her to stop at his office some time during that day and, although he was very busy, he would talk to her. When she arrived at his office, he was engaged in long-distance telephone discussions, and when Mrs. Slane told him that she wanted to know what would happen at the court hearing on the following day, he told her to return at 8:00 o'clock that evening, as he and his wife would be working at their respective offices that night.

Mrs. Slane met Attorney Gibson at his office as arranged and Attorney Gibson sat on a sofa and had Mrs. Slane sit in a chair opposite him. He asked her three times to move the chair closer to him, and she did. One of the first things Attorney Gibson told Mrs. Slane at this meetings was that he had been thinking about her problem as he was returning to the office and that he decided to represent her in the marital matter, although she had not asked him to do so. He then told her of some dreams he had been having recently, which included her and her family, and he began discussing a certain religious doctrine concerning how many persons one should love. Attorney Gibson expressed his belief that it was acceptable to have more than one person to love, provided that everything was satisfactory with one's spouse, adding that the spouse should not be aware of the other person.

The discussion continued, and at some point Attorney Gibson told Mrs. Slane to take her clothes off. She declined. Some time thereafter Attorney Gibson made a cup of coffee for himself and a cup of tea for Mrs. Slane. When he went to get the tea, he turned the office lights off, knelt beside Mrs. Slane's chair, began kissing her, put his hands inside her blouse and fondled her breasts, and moved his hands over her pelvic area outside of her clothing. In order to stop him, Mrs. Slane told him that she was visualizing being beaten and was frightened. Attorney Gibson stopped at once, got up, turned on the lights, got the tea and returned to converse with Mrs. Slane.

Attorney Gibson told Mrs. Slane that what had happened between was to be a secret. He told her it was necessary to relieve sexual tensions and that it was something that could continue to happen between them, but it would have to be on his terms,—once a week, once a month, or once a year. They then discussed her financial problems, after which he telephoned his wife and told her he was ready to leave and would pick her up at her office some two blocks away. Attorney Gibson and Mrs. Slane left the office, went to his car in the basement of the building and drove to her car parked on the street.

Mrs. Slane testified that she had experienced a nightmare during the early morning hours of the next day, which consisted of a replay of the events with Attorney Gibson of the previous evening, and when she awoke she was screaming and began to cry uncontrollably. She testified to having had to same or a similar nightmare frequently since the incident, sometimes as often as two or three times a week.

The morning of the hearing, Mrs. Slane telephoned Judge Bruner's office and briefly told the judge's staff what had occurred the night before and stated that she did not want Attorney Gibson to attend the hearing on the temporary restraining order scheduled for that afternoon. The staff person advised her to go to the Rape Crisis Center, which she did before going to court. She arrived at the courthouse visibly upset, and she was approached and counseled by a social worker whom she had been seeing.

Attorney Gibson appeared at the courtroom before the hearing began. When he was told that Mrs. Slane did not want him there, he asked her husband whether he wanted him to represent him at the hearing. The husband declined.

On the day following the hearing, Mrs. Slane reported the incident with Attorney Gibson to the police. During her interview with an officer investigating the matter, she said she was willing to sign a complaint. The matter apparently was not pursued.

Attorney Gibson denied having made any sexual advances, as Mrs. Slane had claimed, but he admitted that he had on occasion, complimented her on her looks and her appearance. He testified that during the meeting with Mrs. Slane in his office on the evening of July 13, 1982, he went over with her an outline explaining the procedure that would be followed at the motion hearing the following day.

In the disciplinary proceeding, the Board presented the testimony of four women, each a former client of Attorney Gibson, who testified that during his representation of them in a variety of matters he engaged in unsolicited sexual conversation and conduct with them. That conduct occurred over a period of time from 1975 to 1982. The Board presented this proof of similar acts to show a plan of which Attorney Gibson's conduct with Mrs. Slane could reasonably be said to be a part, that is, the Board attempted to establish a plan by Attorney Gibson to take sexual advantage of vulnerable female clients, albeit without force and subject to their rejection of his suggestions and advances.

The Board also introduced evidence of Attorney Gibson's conviction in 1971 on his no contest plea of contributing to the delinquency of a minor. The criminal complaint in that matter had charged him with having sexual intercourse with a 17-year-old girl who was living in the Gibson home as a result of a foster home placement. Sentence was withheld on the condition that Attorney Gibson pursue psychiatric treatment. The Board introduced this evidence not as part of its attempt to

show a pattern of sexual obsession on the part of Attorney Gibson but as evidence on the question of appropriate discipline.

Attorney Gibson argued that the testimony of the former clients was not admissible because his motive, intent and plan were not at issue in the disciplinary proceeding and the "other acts" evidence was not probative of any motive or intent he had concerning the specific misconduct with which he had been charged. Attorney Gibson contended that the testimony of the former clients was offered for the sole purpose of showing that he had a propensity to make sexual advances to female clients, and he argued that such evidence is not admissible for that purpose and that, even if it were admissible, its probative value was outweighed by the danger of unfair prejudice and confusion of the issues. Because the referee's findings with respect to what occurred between Attorney Gibson and Mrs. Slane were based on his determination of the crediblity of the witnesses and were explicitly based, in part, on the testimony of the former clients, Attorney Gibson argued that these findings of fact should be rejected as clearly erroneous.

It is unnecessary that we address this issue of the admissibility of the former clients' testimony for the reason that the referee made clear in his report that his determination of the credibility issue rested on the testimony of another witness, the Hon. Robert Martin, federal bankruptcy judge, who testified that in numerous appearances before him, Attorney Gibson was not absolutely reliable and failed to meet that standard of truthfulness which the judge considered important in an attorney. The referee stated that he determined the relative credibility of Attorney Gibson and Mrs. Slane as he did "particularly because [Mrs. Slane's testimony] is supported by the testimony of [three of the four former clients], all involving matters of sexual connotations with clients." He stated further, however, "In considering the veracity of Slane and Respondent, the testimony of Judge Martin that Respondent's word is not reliable is sufficient to weigh the scales against Respondent." Consequently, there is sufficient evidence independent of the testimony of the

former clients to support the referee's findings, and they are therefore not clearly erroneous.

Attorney Gibson further contended that the facts found by the referee that he made unsolicited sexual advances to his client do not support the conclusion that he thereby violated SCR 20.35(1)(c), which provides:

> "(1) A lawyer may not intentionally:
>
> . . .
>
> (c) Prejudice or damage the client during the course of the professional relationship, except as required under SCR 20.36(2)."

He argued that there was no evidence that he intended harm to his client, which he contended was a necessary element to a violation of that ethical rule, and he maintained that his conduct did not cause any harm to his client's legal interests, taking the position that the rule applies only to prejudice or damage to a client's interest in the lawyer's professional representation. He contended that Mrs. Slane's nightmares and her distraught condition at the hearing on the temporary order, as to which Judge Bruner testified, could not reasonably have been considered to constitute "damage" or "prejudice."

Attorney Gibson also contended that the referee improperly concluded that he engaged in misconduct by violating "Ethical Considerations" which he was not charged with having violated and which have not previously been recognized by this court as constituting a basis for attorney discipline. In support of his position, he cited SCR 20.002:

> "The ethical considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.
>
> "The disciplinary rules, unlike the ethical considerations, are mandatory in character . . ."

It is unnecessary to consider Attorney Gibson's contentions concerning the applicability of SCR 20.35(1)(c) and the specific Ethical Considerations relied upon by the referee, including the contention that they are vague and overbroad and their application to Attorney Gibson violates his constitutional right to due process; we conclude that Attorney Gibson's actions violated a standard of attorney professional conduct we set forth in *State v. Heilprin*, *supra*, which involved an attorney charged with conduct similar to but more aggravated than Attorney Gibson's. In *Heilprin* we stated: "Conduct of the type engaged in by Heilprin cannot be condoned, whatever the cause. The public must not be exposed to this type of action from members of the legal profession." 59 Wis.2d 312, 322. Consequently, Attorney Gibson's actions toward his client subject him to discipline for misconduct. SCR 21.05(5).[3]

We reiterate our determination in *Heilprin* that the public must not be subjected to unsolicited sexual conduct by attorneys in the context of an attorney-client relationship. Frequently, the client is in some difficulty and, as a result, is particularly vulnerable to improper advances made by the attorney. The client rightfully looks upon the attorney as legal advisor, one who will act in the client's best interests. Often, a client will be reluctant to terminate representation in response to an attorney's improper conduct for fear of losing time and money already invested in the attorney's representation.

The attorney stands in a fiduciary relationship with the client and should exercise professional judgment "solely for the benefit of the client and free of compromising influences and loyalties." SCR 20.23(1). By making unsolicited sexual advances to a

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[3]SCR 21.05 provides:

"Grounds of Discipline. An attorney is subject to discipline for misconduct. Misconduct is conduct that violates:

. . .

(5) A standard of professional conduct as defined by the supreme court by rule, order or decision."

client, an attorney perverts the very essence of the lawyer-client relationship. Such egregious conduct most certainly warrants discipline.

The referee recommended a 90-day suspension of Attorney Gibson's license to practice law as appropriate discipline, and that recommendation was explicitly based on the testimony of the former clients. However, we do not rely on that recommendation in determining appropriate discipline in this case. In imposing a 90-day suspension of the license of Attorney Gibson to practice law in Wisconsin, we do not consider, as did the referee, the cumulative testimony in the record or Attorney Gibson's prior conviction; the discipline we impose is in response to only that conduct Attorney Gibson was found to have engaged in with Mrs. Slane.

IT IS ORDERED that the license of Attorney John W. Gibson to practice law in Wisconsin is suspended for a period of 90 days, commencing August 1, 1985.

IT IS FURTHER ORDERED that within 120 days of the date of this order Attorney John W. Gibson pay to the Board of Attorneys Professional Responsibility the costs of this disciplinary proceeding, provided that if the costs are not paid within the time specified and absent a showing by Attorney Gibson of his inability to pay the costs within the time specified, the license of Attorney John W. Gibson to practice law in Wisconsin shall be suspended until further order of the court.

IT IS FURTHER ORDERED that Attorney John W. Gibson comply with the provisions of SCR 22.26 concerning the requirements of a person whose license to practice law in Wisconsin has been suspended.

Ceci, J., dissents from that portion of the court's order imposing discipline and would impose discipline more severe than a 90-day suspension of Attorney Gibson's license to practice law.

Abrahamson, J., did not participate.

APPENDIX B

APPENDIX B

State of Wisconsin in Supreme Court

In the Matter of the Disciplinary Proceedings Against

JOHN W. GIBSON
Attorney at Law,

Respondent.

REFEREE'S REPORT AND RECOMMENDATION

(entered January 2, 1985)
Case No. 84-731-D

The above entitled matter having been referred to the undersigned as Referee, and the Board of Attorneys Professional Responsibility appearing by its counsel, Frank M. Tuerkheimer, 122 Quarterdeck Drive, Madison, Wisconsin 53705, and the Respondent appearing in person and by his counsel, Daniel W. Hildebrand, One South Pinckney Street, Madison, Wisconsin 53703;

The hearing was convened at the Dane County Courthouse, Madison, Wisconsin, at 9:00 a.m. on November 14, 1984 and continued through November 15, 1984 and continued through November 15, 1984.

SYNOPSIS OF TESTIMONY

Diane Leigh Slane

Mrs. Slane is the 39 year old wife of Roger Slane and mother of five. She first consulted with Respondent in June of 1981. She, along with her husband, had various legal problems and met with him approximately twenty times, Mr. Slane being present about fifteen times. During certain of the interviews Respondent complimented her and on occasion mentioned the size and shape of her breasts. (T. 16) In one interview he discussed a client who invited him to have sexual relations with her and that he had declined. (T. 17) Just prior to July 13, 1982 Mrs.

Slane charged her husband with abusing her and a temporary restraining order was issued by Judge Bruner with a hearing for a permanent order scheduled for July 14. She called "John" (Respondent) (T. 20) on July 13 to ask what would happen at the hearing. She went to his office during the afternoon of the 13th and saw him in his private office and was there a period of time during which he had several telephone calls. He told her he was too busy to talk with her at that time and told her to return that evening at 8:00 p.m. She returned and waited for "John" at the elevator in his office building. When he arrived they went to his private office. She sat on a chair and he sat on the sofa. He suggested that it was okay to have more than one person to love even if married and at some point said "take your clothes off" and she said "no." (T. 28) The conversation continued until about 9:00. The following is a quote from Slane's testimony:

> "A. Then he came back, he came over beside the chair and he knelt down beside me. He started to kiss me—I remember that there was a real strong minty flavor in his mouth and there was a lot of after shave smell on him. I had gotten new glasses and I was real concerned if they were going to break. I said to him, "I need to take off my glasses," and he stopped just like that, took my glasses off and I was going to put them back on the desk. I looked back and I said this object that was on the desk and I had seen it there before, but for some reason that scared me at that particular time; and it was about, approximately a nine-inch to a foot-long alligator made out of wood where you put business cards in, in the spines of the alligator. I was really afraid maybe he would use that as a weapon if I wouldn't cooperate with what he was doing, but I didn't say anything. Then I think he continued to kiss me. At any rate then he went from that to going inside of my blouse, inside of my bra, he started fondling my breasts. Then he went down towards my crotch area and I had my legs really tight together, and he tried to pull them apart and I tried to put them together—this

> happened several times. At any rate, he won, and then he started to arouse me in that area. I'm thinking in my head, how am I going to get out of this, and I looked out the window and I thought this isn't going to work, it's nine floors down, I can't jump out the window. Then I was thinking I'm just going to get up and leave, and I'm thinking it's all dark and nine floors down in the elevator, and I don't know where I'm going." (T. 29-30)

Mrs. Slane stated she was scared and she told Respondent she was having pictures of someone beating her up, and he "stopped just like that" (T. 31) and said to her "that what had happened was something that was a little secret that we would have to keep in our hearts. That it was really necessary to relieve sexual tensions and that it could be something that could happen, it would have to be on his terms; it could be once a week, once a month or once a year." (T. 32) During an interview prior to the July 13 incident, Respondent told her that a person couldn't have any sexual encounter with a client because if they did "he" could lose his license. (T. 36) After Mrs. Slane left the office on July 13 she returned to her home and after going to bed was awakened by a nightmare because of what had happened between her and "John." She started to cry and couldn't stop crying and those nightmares have been happening periodically since that time. (T. 34) On July 14 she called Judge Bruner and was upset and cried. He suggested that she go to the home for battered women which she did before appearing in court.

Prior to July 13 Mrs. Slane was upset with the Respondent because he could not proceed with a divorce for her and because he had not proceeded on an insurance claim. (T. 41) Respondent did not bill her for any of his services except for a bankruptcy proceeding. (T. 42) After the July 14 incident she reported to the Madison Police that "Gibson had tried to do something to me that was like rape." (T. 57)

Roger Slane

Roger Slane retained Respondent in connection with a Chap-

ter 13 bankruptcy proceeding. Gibson, in a conference, suggested that lovemaking was a cure-all to make things "go good." (T. 68) He testified that his wife told him that Gibson had commented about her breasts and that he (Slane) downplayed it and told her he (Gibson) is trying to make you feel good. (T. 69) Mrs. Slane was near hysterics at the time of the July 14 hearing. He had seen her in that condition before when there had been domestic violence in the home before. (T. 71, 72) He had left the Slane home on the weekend prior to July 13. (T. 72) On the 14th Mrs. Slane told him that she had had a night appointment with Respondent and that he "turned the lights off and fondled her breasts and tried to play with her genitals." (T. 72)

Nancy Taylor

Mrs. Taylor, a social worker, was present in Judge Bruner's court on July 14 and observed Diane Slane, who was "trembling like a leaf and agitated" and was very upset. She quoted Slane as saying Gibson had kissed her and "had done some other things and she didn't want to see him." (T. 81) Slane was concerned about what to do about the incident with Gibson and "wanted to have charges pressed or she wanted to enter a complaint or have some consequence for him because she was so upset by what happened to her." (T. 82)

Judge Ervin Bruner

Diane Slane informed Judge Bruner's clerk prior to the July 14 hearing that she did not want Gibson present and related that she was upset because of the episode on July 13. (T. 90)

Georgina Forbes

Mrs. Forbes, a 53 year old divorcee and secretary employed at the University of Wisconsin, retained Respondent in a divorce proceeding early in 1975. He represented her for a period of approximately a year and a half and she met with him frequently, at least every two weeks during the divorce proceedings. (T. 102) Respondent commented about her appearance, told her he was infatuated with her and that he had dreams and fantasies about her and that she turned him on. Such comments were made on three or four occasions. (T. 103) Gibson inquired as to

her sex life, if she had a boyfriend and stated that he and his wife had a very satisfactory sex life. (T. 104) About two months before the divorce he arranged to meet her for lunch at the Howard Johnson restaurant to discuss the action. During lunch Gibson left the table, returned and then suggested they leave. They entered an elevator which Mrs. Forbes thought would lead to the parking lot but she and Gibson ended up in a motel room to which he had a key. (T. 105) Her testimony was as follows:

> "Q. What happened when you got into the room?
>
> "A. Well, I can't remember exactly what was said. I just said, 'What is this? What's going on?' John said, 'Well, I thought we could get to know each other better,' and I said I was sorry if he felt that I would go along with something like that. He said, 'I'm definitely not going to force you to do anything against your will,' and I said, 'Okay. I want to leave.' We left immediately and he dropped me off at work." (T. 106)

Respondent never physically touched her (T. 113) and continued to act as her attorney after the incident.

Susan Garrett

Susan Garrett, a 44 year old divorcee, employed Respondent regarding a traffic charge after being referred to him by Nancy Weege. (T. 118) She first saw him in the spring of 1981. (T. 125) She conferred with Respondent after spending a night in jail and saw him numerous times thereafter. She was having domestic problems and Respondent suggested a divorce and she told him she couldn't afford it. Her testimony was:

> "Q. What did he say?
>
> "A. He said I should get a divorce.
>
> "Q. What did you say?
>
> "A. 'I can't afford it.'
>
> "Q. What did he say?

"A. That's when he said if I fucked him a couple of times a month that would take care of it.

"Q. What did you say to that?

"A. Nothing." (T. 122)

She paid Gibson a total amount of $75.00 to $100.00, although he represented her in several matters. He did not represent her in her divorce.

Nancy Weege

Mrs. Weege, a 50 year old nurse at Madison General Hospital employed Gibson in August of 1979. She counseled with Respondent concerning financial problems after seeing his ad in the yellow pages and in connection with a divorce proceeding met with him on many occasions. (T. 135) During their conversations he would make comments such as "God you're beautiful" and "I would love to go to bed with you," (T. 136, 137), and discussed an unnamed client who had been charged with some sort of sexual contact with a young girl which conversation had no bearing on her problem. (T. 137) She paid him a total of $150.00 in connection with the bankruptcy and other matters which were the subject of her conferences with him. (T. 139) Respondent suggested they have an affair and urged upon her the need for discretion because of his and his wife's status in the community. She was speechless and her feeling was "that I expected him to whip out a contract." He did nothing physical to put his proposition into effect. (T. 138) He did not represent her in the divorce action as she transferred that matter to another attorney. (T. 139) She referred Mrs. Garrett to Respondent because she thought he was genuinely interested in her and that "she didn't believe he came on to everyone like that." (T. 140) She kept a diary and in the diary referred to Gibson as "her F_ _ _ _ _ G lawyer." The diary contains the following entry:

"Wednesday, 1/9. Five more hours with John Gibson, two of which were lunch. He wants to take care of me forever—I consider this a life-long commitment. I just kept laughing at him. He's not charging

me . . . Four hours. Would like to put a force field around me but can't." (T. 158)

Dr. Klaus Diem

Dr. Klaus Diem, an obstetrician at Madison General Hospital worked with Nancy Weege who told him that Gibson told her she was sexy and that the two of them would be good together and suggested they go to bed together and "somehow that would be to her best interest in the other matter that she was seeing her attorney about." (T. 155)

Beverly Klingbeil

Mrs. Klingbeil, a 39 year old divorcee employed as a nurse, conferred with Gibson concerning a divorce in the summer of 1980. She was referred to him by Mrs. Gibson (T. 161). At their first conference he told her she was a very beautiful woman and inquired as to whether there had been any sexual abuse by an uncle or a father. (T. 162) He arranged a luncheon meeting and at the meeting asked her if she was being sexually fulfilled and suggested that two people didn't necessarily have to be married in order to have a good sexual relationship. (T. 167) She was uncomfortable with the conversation and didn't feel that it pertained to the purpose of their meeting.

Ralph Quinones

Ralph Quinones was employed by Respondent as a law clerk and had access to the office at all times. (T. 192) He had keys to the office as well as the elevator. On occasion he worked evenings and testified that he would have had access to the office on the night of July 13.

Patricia Hammel

Patricia Hammel shared office space with Respondent and had access and keys to the office at all times, including the night of July 13, as did two or three other office persons and cleaning personnel. She testified that Respondent was a generous person but somewhat disorganized. In her first conference with him when she interviewed for an office space, he mentioned that he had a wonderful sex life with his wife, which struck her as strange. "It was the first time I had ever met him, but he was very personal in his conversations." (T. 209).

CHARACTER WITNESSES

Respondent called sixteen clients who testified that he had served them well, had not discussed sex and that they were satisfied with his services. He represented them in a variety of matters but primarily bankruptcy and marital problems. Without exception, they testified that he represented them competently and that there were no vulgarities, and no sexual discussions except as might be essential to their particular problem.

Judith Bowser

Mrs. Bowser testified that from 1974 to 1979 Gibson coached a soccer team on which her daughter played and she had no fault to find with him but if she had known of his prior conviction for a sexual offense, she would have removed her daughter from the team. (T. 282)

Eunice Gibson

Mrs. Gibson is Respondent's wife of 29 years. Mr. and Mrs. Gibson have five children and two grandchildren. She has been employed as an assistant Madison city attorney since 1974. She often works nights and usually on those nights Respondent goes to his office. They each went to work on July 13th and that night she had a key to his office and could have entered his office at any time if she had so chosen.

Criminal Conviction

Board exhibit six is a Criminal Complaint, Warrant and Judgment of Conviction wherein Respondent was convicted of contributing to the delinquency of a minor. The offense occurred August 7, 1971. He was found guilty December 24, 1971 on his plea of no contest. The complaint charged him with having sexual intercourse with a 17 year old female living in the Gibson home, then licensed as a foster home. Counsel in this action stipulated that the conviction was brought to the attention of the then Board of State Bar Commissioner and no action was taken by that body. (T. 303) In the criminal action sentence was withheld and as a condition Respondent was to see a psychiatrist.

John W. Gibson

Mr. Gibson, 52 years of age, graduated from the University of Wisconsin Law School in February of 1961 and was admitted to the Wisconsin Bar at that time. He has practiced law in Madison since 1971. He first met Diane Slane in 1981. Mrs. Slane and her husband consulted with him on various matters, including bankruptcy, traffic problems, and problems with a son. Mrs. Slane also consulted with him relative to a divorce and as to physical abuse from her husband. On July 13 Mrs. Slane appeared at his office at 3:30 p.m. Shortly after she entered his private office he had a phone call which was extended. At its conclusion he suggested that she return at 8:00 p.m. (T. 340) He met with Slane at 8:00 and testified that she sat on a chair and he sat on a couch. He discussed domestic abuse with her for about an hour and a half and after that time there was a discussion as to a reconciliation between the Slanes. (T. 350)

Mrs. Slane was upset because her husband was beating her and he had taken to sleeping in the furnace room and that he shouted and screamed at the children. (T. 351) Mrs. Slane stated that she had been subject to grand and petit mal seizures that had caused her to black out and that she was under terrible emotional stress. (T. 353) Mrs. Slane described an experience with a counselor at the Dane County Health and Social Services and said that she had a crush on him. (T. 355) Respondent absolutely denied any kind of sexual intercourse or attempt to have a sexual encounter with Mrs. Slane. (T 357) The statements by Mrs. Forbes (T. 364), Mrs. Garrett (T. 383), Mrs. Weege (T. 369) and Mrs. Klingbeil are false. As to the testimony of Mrs. Klingbeil, he stated that he had no conversations with Mrs. Klingbeil that had any sexual connotation. (T. 393)

Judge Robert Martin

Judge Martin is bankruptcy judge for the Western District of Wisconsin. Respondent appeared before him hundreds of times. (T. 343) When asked if he had an opinion as to Respondent's reliability as to truthfulness his answer was yes and his opinion was, "That his word is not absolutely reliable. In fact, it's not particularly reliable, and that he fails to meet the standard of truthfulness in some regards that I feel is important." (T.343)

FINDINGS OF FACT

1. The Board of Attorneys Professional Responsibility is a statutory body organized and existing under Chapter 21, Supreme Court Rules, and is now acting as such.

2. The Respondent is 52 years of age, practicing law in the State of Wisconsin and was admitted to the Bar in February of 1961.

3. All allegations of the complaint were admitted except paragraphs six and seven, which provide:

> "6. Slane returned to Gibson's office at 8:00 p.m. on July 13, 1982. Only she and Gibson were present. Gibson initiated an unsolicited sexual encounter with Slane without her consent. After she refused his request to remove her clothes, he began kissing her and he touched her breasts. When he attempted to touch her in the pelvic region, she resisted and told him she was visualizing being beaten. Thereafter he stopped all sexual contact.
>
> "7. Gibson's conduct as described in paragraph 6 had a deleterious effect on his client, at the time, on the day of the hearing which followed, and afterwards."

A. I find all allegations of the complaint to be true and proved by clear and satisfactory evidence.

B. Although Respondent categorically denied all of the accusations of his client, Slane, I choose to disbelieve his testimony and believe that of Mrs. Slane, particularly because it is supported by the testimony of Forbes, Weege and Klingbeil, all involving matters of sexual connotations with clients. The statement of Patricia Hammel when being interviewed for office space and on the first occasion that she had met Respondent to the effect that he "had a wonderful sex life with his wife" further verifies Respondent's obsession with sex. The testimony of those witnesses and his previous conviction of a sexual offense all indicate that the Respond-

ent is obsessed with sex. In considering the veracity of Slane and Respondent, the testimony of Judge Martin that Respondent's word is not reliable is sufficient to weigh the scales against Respondent.

CONCLUSIONS OF LAW

The instant charge is brought under SCR 20.35:

"SCR 20.35 REPRESENTING A CLIENT ZEALOUSLY

(1) A lawyer may not intentionally:

"(a) * * *

"(b) * * *

"(c) Prejudice or damage the client during the course of the professional relationship, except as required under SCR 20.36(2)."

The record substantiates that Diane Slane was upset and distraught as a result of Respondent's advances and conduct on the night of July 13. That state of agitation and continuing trauma resulted from an attorney/client relationship. Mrs. Slane was present in the Gibson office as a client, not to participate in a sexual encounter.

The testimony of Slane, Forbes, Weege, Garrett, Klingbeil, and Hammel show an ongoing sexual aberration. All of the incidents (except Hammel) occurred in an attorney/client relationship. This Court considered sexual misconduct on the part of an attorney in *State v. Heilprin*[1]. In that case Heilprin was charged with, among other things, conduct similar to Gibson but more aggravated in that he exposed himself to a female client. The Court commented:

"Conduct of the type engaged in by Heilprin can-

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[1]*State v. Heilprin*, 59 Wis. 2d 312, 207 N.W.2d 878 (1973)

> not be condoned, whatever the cause. The public must not be exposed to this type of action by members of the legal profession."

The Court then ruled that Attorney Heilprin's license to practice be suspended until such time as the Court determined that he had recovered from a personality disorder.

The only other Wisconsin authority brought to my attention was a public reprimand issued by the Board of State Bar Commissioners and approved by the Court wherein Attorney John B. Christians of Lake Geneva, Wisconsin was guilty of dating a divorce client and pursuing a close personal relationship with her. The reprimand included this statement:

> The course of conduct pursued by Attorney Christians was unprofessional for the further reason that it is of such nature that it tends to bring the legal profession into disrepute."[2]

In a 1976 decision, the Indiana Court[3] considered charges against an attorney who was charged with attempting to gain sexual favors through his representation of female clients. The attorney offered to pay one client for nude pictures of herself and permitting him to take such pictures. Initially the client declined. At a later date the Respondent renewed the offer and the client indicated she would return with her decision. She reported the matter to the local police who wired her with a recording device and she returned to the office and accepted his offer and allowed him to take pictures of her with the top half of her clothing removed. He then asked her to remove the balance of her clothing. The Court, in finding the attorney guilty of the charges, determined the cause was not personal and was related to the practice of law and that the improper combining of professional and personal interest established an unfitness to practice law and suspended Respondent's license for one year. The

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[2]Wisconsin Bar Bulletin, June 1974

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[3]In the Matter of Wood, 358 N.E.2d 128 (1976)

Court concluded the *attorney had sought to gain sexual favors from his clients when they were involved in marital and economic difficulties, that the clients came to him for assistance and representation* but that he used that opportunity to pursue personal objectives and stated:

> "This Court has not previously addressed misconduct as found in this proceeding. It should be readily understood at the outset, that this Court does not, cannot, and will not, attempt to establish guidelines for the sexual activities of the members of the bench and bar. Yet, this Court, under the Constitution of the State of Indiana, is given the responsibility of the preservation of the integrity of the judicial system and its officers, and when the sexual activities of an attorney involve conduct which demonstrates an unfitness to practice law, this Court has no alternative but to meet its responsibility and impose discipline, if appropriate."

The Iowa Court considered a complaint involving a female attorney[4] who visited her client in the penitentiary and signed in as his attorney. She was charged with unprofessional conduct while visiting the client, which consisted of permitting the prisoner to kiss and fondle her. This conduct occurred on several occasions. The Court stated that when the attorney entered the visiting room of penetentiary she signed in as an attorney and as a result was representing herself to be appearing in a professional, not personal, capacity and added that sexual contact with a client in a professional context is not activity which a responsible member of the bar would suppose to be allowed by the Iowa Code of Professional Conduct. The court's ruling provided that there was nothing inherently wrong with the lawyer's activities during the visit and if she had not been present in a professional capacity, no violation of the Iowa Code would have occured, and then added:

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[4]Committee on Professional Ethics and Conduct of the Iowa State Bar Association vs. Durham, (Iowa) 279 N.W.2d 280 (1979).

> "We do not mean to say that private sexual conduct by an attorney cannot be violative of the ICPRL, but only that it is not Respondent's conduct per se, which we find reprehensible on these facts, rather it is the *legal capacity* in which she was acting which we find to be the essential element of these violations." (E.S.)

In an early case the Ohio Court took a contrary view.[5]

While no specific precedent exists as a guide to resolve this action, the court ruled in *State v. Postorino*[6], in finding the defendant guilty of unprofessional conduct, growing out of gambling activities that:

> "The lack of a factual precedent is not persuasive because if such a fact were controlling the law would never be applied to new fact situations and consequently would lose its vitality to deal with the ever-changing problems of modern life."

In the same opinion, the Court stated:

> A lawyer is a professional man 24 hours a day, not eight hours, five days a week."

Respondent contends that SCR 20.35 does not apply to his conduct. Whether it does or does not is immaterial since this

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[5]*In State v. Byrkett*, 4 Ohio DEC 89, 3 Ohio NP 28 (1895), the court held seduction by an attorney of his young secretary did not constitute unprofessional conduct involving moral turpitude and did not warrant disciplinary action. The court concluded that moral turpitude not affecting an attorney's professional moral character were not cognizable by the court in a disbarment proceeding unless there had first been a conviction of an offense or an admission of guilt. That the seduction was not accomplished in the character or capacity of an attorney but attributable to the weakness, passions and frailties possessed in greater or lesser degree by all mankind.

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[6]State v. Postorino, 53 Wis.2d 412, 193 N.W.2d 1 (1972)

court's inherent power to supervise the bar and maintain the integrity of the profession is sufficient to impose discipline in a situation as here present, absent a specific rule relating to a specific offense.

Certainly the Supreme Court Rules of ethical considerations clearly support a finding that Respondent is guilty of misconduct and should be disciplined.

SCR 20.002 provides:

> "The disciplinary rules, unlike the ethical considerations, are mandatory in character."

This does not mean that a violation of an ethical consideration might not be the subject of discipline as provided in the rules.

SCR 20.02(5) provides that a lawyer should maintain high standards of professional conduct and refrain from all legal and morally reprehensible conduct.

SCR 20.23 requires that the professional judgment of a lawyer be exercised solely for the benefit of his client free of his personal interest.

SCR 20.48 provides that a lawyer should avoid even the appearance of professional impropriety and that he promote public confidence in the judicial system and the legal profession.

The record clearly establishes that (a) Respondent did not "maintain a high standard of professional conduct" and did engage in "morally reprehensible conduct;" (b) did not exercise professional judgment "solely for the benefit of his client (Slane) free of his personal interest;" (c) and failed to avoid "the appearance of professional impropriety" and certainly did not "promote public confidence in the legal profession."

Mrs. Slane was present in Respondent's office as a client.

A lawyer/client relationship existed.

The Respondent's conduct must be considered as aber-

rational and not that of a diseased mind. No medical testimony was offered to indicate a psychotic condition.

Since the subject of mental illness was not raised a medical suspension cannot be recommended. If the record was supported by medical testimony, a recommendation such as was made by the Court in *Heilprin*, supra, and *In the Matter of Wicklund*[7] might be in order.

Board's Exhibit Six which shows Respondent's conviction of a sexual offense in 1971 was not considered as substantive evidence to prove the allegations of the instant complaint but has been considered as to the proper discipline to be imposed.[8]

---

[7] *In the Matter of Wicklund, 75 Wis. 2d 1, 248 N.W.2d 490 (1977)*

RECOMMENDATION

Cumulative acts of misconduct are cause for concern. Respondent's conduct with Mrs. Slane was not an isolated instance. The cumulative effect of the testimony and record is such as to justify more stringent discipline than a public reprimand.

Based on the above Findings of Fact and Conclusions of Law, I hereby recommend:

1. That Respondent's license to practice be suspended for a period of ninety (90) days.

2. That the Respondent be ordered to pay the costs of the proceeding, to be computed by the Clerk of the Supreme Court.

3. That Respondent comply with all requirements of SCR 22.26, Activities on Revocation and Suspension.

Dated this 2nd day of Janaury, 1985.

/s/ Rudolph P. Regez, Referee

RPR:dh

---

[8] *In the Matter of Rabideau*, 102 Wis.2d 16, 306 N.W.2d 201 (1981)

APPENDIX C

APPENDIX C
(first of two documents)

Office of the Clerk

Supreme Court State of Wisconsin

Madison, July 5, 1985

Atty. Rudolph P. Regez, Sr.
P.O. Box 538
Monroe, WI 53566

To:

Atty. John W. Gibson
131 W. Wilson St., Suite 904
Madison, WI 53703

Atty. Daniel W. Hildebrand
One South Pinckney Street
Madison, WI 53703

Atty. Frank M. Tuerkheimer
122 Quarterdeck Drive
Madison, WI 53705

Board of Attorneys
Professional Responsibility
110 E. Main Street, Room 902
Madison, WI 53703

The Court today announced an order in your case as follows:

No. 84-731-D

In the Matter of Disciplinary Proceedings Against John W. Gibson, Attorney at Law

On June 28, 1985 Attorney Gibson filed a motion for reconsideration of the court's June 24, 1985 order suspending his license to practice law in Wisconsin for 90 days, commencing August 1, 1985 and requesting a stay of that order pending his intended appeal to the U.S. Supreme Court. On July 5, 1985

the Board of Attorneys Professional Responsibility filed a memorandum in opposition to the motion.

IT IS ORDERED that the motion is denied. $50 costs.

Abrahamson and Ceci, JJ., did not participate.

Marilyn L. Graves
Clerk of Supreme Court

APPENDIX C
(second of two documents)

State of Wisconsin in Supreme Court

In the Matter of the Disciplinary Proceedings Against:

John W. Gibson,
Attorney at Law.

JUDGMENT FOR COSTS
Case No. 84-731-D

On June 24, 1985, costs were assessed in the above action pursuant to Supreme Court Rule 22.20.

Costs are hereby taxed in favor of the Board of Attorneys Professional Responsibility, 110 East Main Street, Madison, Wisconsin; 53703, and against John W. Gibson, who resides at 131 W. Wilson St., Suite 904, Madison, WI 53703, in the sum of $9,193.35.

Dated August 14, 1985.

/s/ Marilyn L. Graves
Clerk of Supreme Court

APPENDIX D

APPENDIX D
(first of two documents)

State of Wisconsin in Supreme Court

In the Matter of the Disciplinary Proceedings Against:

John W. Gibson,
Attorney at Law,

Case No. 84-731-D

Respondent.

NOTICE TO APPEAL TO THE UNITED STATES SUPREME COURT

TO: Clerk, Wisconsin Supreme Court

Frank M. Tuerkheimer
Attorney for Board of Attorneys
Professional Responsibility

Notice is hereby given that John W. Gibson, the above-named Respondent, appeals to the United States Supreme Court from the final Decision and Order of the Wisconsin Supreme Court, dated June 24, 1985, suspending his license to practice law for ninety days commencing August 1, 1985, and from the final Order denying the Motions for Reconsideration and for a Stay of Proceedings, dated July 5, 1985.

This appeal is taken pursuant to 28 U.S.C., §1257(2).

Dated: July 17, 1985.

I certify that on July 17, 1985 I served the within document on the following person(s), by

/s/ Daniel W. Hildebrand
Ross & Stevens, S.C.
One South Pinckney Street

mail pursuant to Sec. 801.14 Wis. Stats.

/s/ Diane K. Sullivan

Madison, WI 53703
(608) 257-5353
Attorney for Respondent,
John W. Gibson

TO: Frank Tuerkheimer, Esq.
Board of Attorneys Professional Responsibility

APPENDIX D
(second of two documents)

State of Wisconsin in Supreme Court

In the Matter of the Disciplinary Proceedings Against:

John W. Gibson,
Attorney at Law,

Case No. 84-731-D

Respondent.

AMENDED NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

TO: Clerk, Wisconsin Supreme Court

Frank M. Tuerkheimer
Attorney for Board of Attorneys Professional Responsibility

Notice is hereby given that John W. Gibson, the above-named Respondent, appeals to the United States Supreme Court from the final Decision and Order of the Wisconsin

Supreme Court, dated June 24, 1985, suspending his license to practice law for ninety days commencing August 1, 1985; from the final Order denying the Motions for Reconsideration and for a Stay of Proceedings, dated July 5, 1985, and from the Judgment for Costs, dated August 14, 1985.

This appeal is taken pursuant to 28 U.S.C., §1257(2).

Dated: August 20, 1985.

I certify that on August 20, 1985 I served the within document on the following person(s) by mail pursuant to Sec. 801.14 Wis. Stats.

/s/ Diane K. Sullivan

/s/ Daniel W. Hildebrand
Ross & Stevens, S.C.
One South Pinckney Street
Madison, WI 53703
(608) 257-5353
Attorneys for Respondent,
John W. Gibson

TO: Frank Tuerkheimer, Esq.
Board of Attorneys Professional Responsibility
Honorable Bronson C. LaFollette, Atty. Gen.
Robert D. Repasky, Asst. Attorney General

Supreme Court, U.S.
FILED
OCT 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-485

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

IN RE JOHN W. GIBSON,

Appellant.

ON APPEAL FROM THE SUPREME COURT IN WISCONSIN

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT OF MOTION TO DISMISS AND/OR IN OPPOSITION TO ALTERNATIVE PETITION FOR CERTIORARI

BRONSON C. LA FOLLETTE
Attorney General
of Wisconsin

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BEST AVAILABLE COPY

No. 84-485

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

IN RE JOHN W. GIBSON,

Appellant.

ON APPEAL FROM THE SUPREME COURT IN WISCONSIN

MOTION TO DISMISS APPEAL

Now comes the appellee, State of Wisconsin Board of Professional Responsibility, and moves to dismiss the appeal of appellant John Gibson in that it fails to state a substantial question, as more fully set forth in the appellee's brief in support of the motion, and in response to the Jurisdictional Statement

filed with this Court on September 19, 1985.

BRONSON C. LA FOLLETTE
Attorney General
of Wisconsin

ROBERT D. REPASKY
Assistant Attorney General
of Wisconsin
Counsel of Record
Attorneys for appellees

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Post Office Box 7857
Madison, Wisconsin 53707-7857
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No. 84-485

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

IN RE JOHN W. GIBSON,

Appellant.

ON APPEAL FROM THE SUPREME COURT IN WISCONSIN

BRIEF IN OPPOSITION TO APPEAL AND ALTERNATIVELY IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Whether an attorney who is disciplined for making sexual advances toward a female client which include touching her breasts and thighs, in the course of the attorney client relationship, has received "fair notice of the charge" when the discipline is imposed on a theory other than the

particular rule of conduct set forth in the charge; but where the discipline as imposed and the discipline as charged are based upon the same asserted facts and where the conduct charged as prohibited under the rule of conduct is the same conduct determined to have violated a standard previously announced by the state supreme court in an earlier reported disciplinary decision.

2. Whether a 1973 reported disciplinary decision, which detailed a number of actions including sexual conduct, sexual gestures, sexual proposals made towards clients which the state supreme stated could not be condoned, constituted notice to an attorney in 1982 that unsolicited sexual advances to a client and the touching of the clients private sexual parts was a basis for discipline.

3. Whether in 1982, an attorney licensed to practice was necessarily charged with a knowledge that unsolicited sexual advances and the touching of a clients breasts, and thighs in the course of the attorney client relationship was conduct for which the attorney could be disciplined.

4. Whether a male attorney who was aware that sexual activity with a female client in the course of the attorney client relationship could lead to a loss of his license, had "fair notice" of the charge when the facts alleged in the discipline proceedings all concerned unsolicited sexual advances and sexual touching of a female client in the course of the attorney client relationship, but the standard of conduct charged was a particular supreme court rule proscribing conduct which prejudiced or damaged the

client during the course of the professional relationship while the rule under which the discipline was imposed was based on a previous reported decision that prohibited sexual advances and sexual touching of a client.

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OPINIONS BELOW

The opinion of the Wisconsin Supreme Court and the Referee's Report and Recommendation are contained in the Jurisdictional Statement filed by Appellant.

JURISDICTION OF THIS COURT

This is an appeal from a disciplinary determination of the Wisconsin Supreme Court in an attorney discipline matter. The appellant contends that there was a failure of "fair notice" and that the decision was vague. Appellant contends that the appeal presents a substantial issue involving due process.

The appellee, herein, asserts in this brief that the appellant received fair notice of the misconduct charged, that the decision upon which the

determination of misconduct was based was clear to any reasonable interpretation by attorneys, and that in any event the appellant knew or should have known that the sexual conduct he engaged in was prohibited conduct.

CONSTITUTIONAL PROVISIONS

Section 1 of the fourteenth amendment to the United States Constitution provides:

> nor shall any State deprive any person of life, liberty or property without due process of law ...

Wisconsin Supreme Court Rule 20.05(5) provides:

> An attorney is subject to discipline for misconduct. Misconduct is conduct that violates
>
> ...
>
> (5) A standard of professional conduct as defined by the supreme court by rule, order or decision.

STATEMENT OF THE CASE

I. The Charges.

This appeal is from a suspension imposed upon a licensed male attorney by the Wisconsin Supreme Court. The discipline arose out of a complaint by a female client in alleging that the appellant had made sexual advances towards her which included placing his hand inside of her bra and touching her breasts and placing his hand under her clothing and touching her pelvic area (A.-Ap. B-2-3). On the basis of this complaint, the State Board of Attorneys Professional Responsibility filed a complaint detailing the alleged conduct and charging it as a violation of the Wisconsin Supreme Court Rule 20.35(1)(c) [DR 7-101(a) (3)] which proscribes conduct that intentionally prejudices or

damages the client during the course of the professional relationship.

The appellant denied the conduct alleged and contended that the conduct would not violate the disciplinary rule.

II. The Proceedings.

In accordance with the Wisconsin practice, a referee was appointed to hear the matter. At the hearing the Board set forth the conduct alleged. The appellant denied the conduct, and contended that the conduct did not violate the rule of professional conduct.

On January 2, 1985, the referee submitted a report and recommendations. The referee found that the appellant had engaged in the conduct alleged (A.-Ap. B-10-11). The referee did not specifically reach a conclusion as to

whether the conduct violated SCR 20.35(1)(c), but concluded that the conduct violated a number of ethical considerations and recommended a 90 day suspension (A.-Ap. B-14-15).

The Wisconsin Supreme Court accepted the findings of fact by the referee to the effect that the conduct had occurred as charged, but decided it was unnecessary to determine whether the conduct violated SCR 20.35(1)(c), because it concluded that the conduct violated a standard of conduct that had been enunciated in its 1973 decision in State v. Heilprin, 59 Wis. 2d 312, 313, 207 N.W.2d 878 (A.-Ap. A-8).

The supreme court accepted the recommendation as to the discipline and directed a 90 day suspension. In addition to the suspension, and in

accordance with Wisconsin procedure, the court directed the appellant to pay the costs of the discipline action which amounted to $9,193.35. The appellant raised the issues presented here in a Motion for Reconsideration in the Wisconsin Supreme Court (A. Juris. Statement-4).

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The appellant contends that this appeal raises a substantial question of due process notice, as first enunciated in In re Ruffalo, 390 U.S. 544 (1968). In Ruffalo, this court concuded that an attorney, Ruffalo, had been denied due process when having been charged with hiring another to "solicit" clients and having testified at length that he had actually hired the man to "investigate" cases, was then for the first time

charged with a violation of hiring the man to "investigate."

This court quite correctly concluded that the process was a trap, and that Ruffalo had a due process right to know that the charge would be hiring an investigator before he defended himself by testifying that he did the hiring. The defect in Ruffalo was that the attorney did not have knowledge that the activity of hiring an investigator would become the prohibited conduct. Moreover the conduct, hiring an investigator, was not the type of conduct that should be apparent to a scrupulous person, was improper. Ruffalo (separate opinion) at 536.

In this case, the actions that appellant was alleged and found to have committed were the same actions that the discipline was imposed for, the sexual

conduct towards a female client. The "charge" did not alter from the hearing to the Wisconsin Supreme Court decision, only the reasoning towards the violation differed. The discipline action here was imposed for the conduct charged, but under a different theory.

As this court noted in Zauderer v. Office of Disciplinary Counsel, ___ U.S. ___, 85 L. Ed. 2d 652 (1985) at n. 18, "the difference between the theory of the Office of Disciplinary Council and the Board of Bar Commissioners had no such prejudical effect on appellant." In this instance, appellant had an opportunity to respond to the application of Heilprin on his Motion for Reconsideration to the Wisconsin Supreme Court.

Unlike Ruffalo, there was no trap. Appellant was charged with unsolicited

sexual conduct with a female client during the attorney-client relationship and was disciplined for the unsolicited sexual conduct. The difference between the referee's recommendation and the decision of the Wisconsin Supreme Court was simply a difference in the "theory" of how unsolicited sexual conduct and sexual touching constituted a violation of professional conduct.

There is no disagreement between the decisions of this Court and other courts that is relevant to the appeal. All of the courts, and this Court agree that an attorney is entitled to notice of the conduct that he/she is charged with committing. Under Wisconsin rules, misconduct is defined as conduct that violates a standard of professional conduct defined by the supreme court by rule, order, or decision (SCR

21.05(5)). The Wisconsin court could base its conclusion of misconduct on a standard articulated by the code or set forth in a decision such as the Heilprin decision.

The appellant is not asserting a substantial due process question, but rather a semantic quibble. Appellant knew that the issue was whether or not he had engaged in unsolicited sexual advances to a female client (A.-Ap. B-3, Tr. 36). This is the matter that was heard and the basis for the discipline. Appellant had fair notice.

The quibbling nature of the appellant's argument is underscored by the testimony of the client that appellant had previously told her that if he had a sexual relationship with a

client he could lose his license (A.-Ap. B-3; Tr. 36).

In the separate opinion of Justices White and Marshall in Ruffalo, at page 555, it is noted that even when a disciplinary standard is unspecific, members of the bar can be "assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment...." Certainly by 1982, even without the publication of the decision in Heilprin, "responsible" attorneys would recognize the type of sexual conduct charged and proved against this appellant was improper for a member of the bar. At least as early as 1977, unsolicited sexual advances towards employes was prohibited conduct, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). The type of sexual touching found to have occurred in

this matter also was contrary to the Wisconsin Criminal Code, sec. 940.225, Stats. The conduct engaged in by the appellant was indeed the type of conduct that any responsible attorney should have known was improper within the attorney-client relationship. Appellant not only should have known that his actions were improper, but did know that sexual advances to a female client were improper.

The decisions of other states support a conclusion that the appellant had fair notice. In Attorney Grievance Comm. v. McBurney, 282 Md. 116, 383 A.2d 58 (1978), the Maryland court held that a specific rule designation was not required so long as the charges advised of the misconduct alleged. In In re Wright, 310 A.2d 1 (1973), it was sufficient that the attorney have notice

of the factual matters alleged as misconduct.

The appellant's contention that a set of court decisions supports the appellant's assertion is not accurate. Thus, in People v. Emerson, 638 P.2d 293, 294 (Colo. 1981), the fault was the failure to advise the attorney of all of the conduct he was to defend against, tax returns. In Committee on Professional Ethics and Grievances v. Johnson, 447 F.2d 169 (3rd Cir. 1971), different "conduct" was charged as the basis for discipline after most of the testimony had been taken. A corollary to Comm. v. Johnson, must be that there would be no violation of due process so long as all of the "wrongful conduct" for which the discipline is imposed is charged.

There is no dispute that an attorney is entitled to "fair notice" of the

misconduct for which he is charged. The sufficiency of the notice is a matter that may be determined with reference to the particular proceedings. As a general proposition, "fair notice" informs of the conduct charged, avoids creating a trap, and is not equivalent to a charge in the theory under which a conclusion is reached that particular conduct is improper. In some instances, as here, the impropriety of the conduct is so clear that the attorney must have realized that it was prohibited.

The appellant contends that his conduct was not included in the prohibitions of the Heilprin decision. Assuming that it was even necessary in 1982 that the Wisconsin Supreme Court specifically held that sexual advances towards a client were improper, the Heilprin decision is not vague. In

Heilprin, the Wisconsin court enumerated a series of actions committed by Heilprin, including sexual touching, and sexual advances, Heilprin at 315. The Wisconsin court held that "Conduct of the type engaged in by Heilprin cannot be condoned, whatever the cause. The public must not be exposed to this type of action from members of the legal profession...." Heilprin at 322. Appellant contends that a reading of the Heilprin case only prohibits aggressive, hostile conduct. While it is true that the decision does prohibit more egregious misconduct, it also clearly prohibits the sexual conduct that was enumerated in Heilprin as conduct of the type that could not be condoned.

In CSC v. Letter Carriers, 413 U.S. 548, 579 (1972), this court observed that although the prohibitions in that case

"may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with...." Likewise, although a fault-finder could pick at the language in Heilprin, an ordinary attorney could understand that after Heilprin, at least, unwanted sexual touching and sexual advances were prohibited conduct.

CONCLUSION

Appellant presents no substantial question. The requirement of "fair notice" is settled. Equally settled is that "fair notice" is notice of the conduct charged as wrongful and for which the discipline is imposed, and is not the theory why the charged conduct is misconduct.

Appellant's assertion that Heilprin is vague is wholly without merit. The blunt statement in Heilprin, that conduct of the type outlined and detailed would not be condoned is less ambiguous than the usual standards of conduct and is not vague, at least not to attorneys exercising ordinary common sense.

The court should not note probable jurisdiction, and the appeal should be dismissed.

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